UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUAN FAIFE,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

---

10 Civ. 0401 (JGK)
06 Cr. 0058 (JGK)

MEMORANDUM OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The petitioner, Juan Faife (the "petitioner"), appearing pro se, moves pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. The petitioner pleaded guilty to one count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and to one count of the underlying substantive offense of distribution and possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A). Pursuant to a plea agreement (the "Plea Agreement") the petitioner waived his right to appeal or litigate under 28 U.S.C. §§ 2255 and 2241.

The petitioner argues he received ineffective assistance of counsel at the time of his sentencing, and that the waiver of the right to appeal or litigate under 28 U.S.C. § 2255 does not bar this section 2255 petition.

I

On November 16, 2006, the petitioner pleaded guilty pursuant to the Plea Agreement to one count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and to one count of distribution and possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A). (Plea Tr. 12:5-13:16, 27:9-15; Plea Agr. 1.) On February 29, 2008, this Court sentenced the petitioner principally to a term of incarceration of 120 months on Counts One and Two, to run concurrently, followed by a three-year term of supervised release on both counts to run concurrently. (Sent. Tr. 26:18-27:7.)

In the Plea Agreement, the parties stipulated that pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 2D1.1(c)(1), the base offense level for Counts One and Two of the superseding information was 38. (Plea Agr. 2.) After a two-level "safety-valve" reduction under U.S.S.G. § 2D1.1(b)(9) and a three-level reduction for acceptance of responsibility under § 3E1.1, the offense level was 33. (Plea Agr. 2.) The Government also calculated that the petitioner had zero criminal history points and accordingly, the parties stipulated that the petitioner was in Criminal History Category I. (Plea Agr. 3.) Based on these calculations, the Stipulated Sentencing Guidelines Range was 135 to 168 months imprisonment. (Plea Agr.

3.) The Plea Agreement also provided that 21 U.S.C. §§ 846 and 841(b)(1)(A) required a statutory minimum term of 120 months. (Plea Agr. 3.) However, the Government concluded that the petitioner was eligible for relief from the minimum statutory provision based on his satisfaction of the "safety-valve" criteria set forth in 18 U.S.C. § 3553(f). (Plea Agr. 3.) The Government sought a sentence within the Stipulated Sentencing Guidelines Range, without regard to the statutory minimum sentence. (Plea Agr. 3.)

The Plea Agreement contained a waiver provision by which the petitioner agreed that he "will not file a direct appeal, nor litigate under Title 28, United States Code, Section 2255 and/or Section 2241, any sentence within or below this Stipulated Guidelines Range of 135 to 168 months." (Plea. Agr. 4.) The parties further agreed that any sentence within the Stipulated Sentencing Guidelines Range would be reasonable. (Plea Agr. 3.)

The petitioner entered his guilty plea on November 16, 2006, with the assistance of a Spanish interpreter. (Plea Tr. 1-2:16.) Before accepting the plea, this Court advised the petitioner of each of the constitutional rights he would be waiving by pleading guilty. (Plea Tr. 7:17-11:14.) The petitioner indicated his understanding and his desire to plead guilty. (Plea Tr. 7:17-19:14.) The petitioner indicated that

he had discussed the waiver of indictment and his guilty plea with his attorney. (Plea Tr. 6:22-7:1.) The Court asked, "Are you satisfied with Mr. Leader and his representation of you?" (Plea Tr. 7:2-3.) The petitioner responded, "Yes." (Plea Tr. 7:4.) The petitioner acknowledged that he was waiving the right to prosecution by indictment and agreed to proceed by the superseding information, and the Court summarized the charges for him. (Plea Tr. 10:7-13:16.) The Court explained the maximum penalties for the crimes as well as the mandatory minimum sentences and the petitioner said that he understood. (Plea Tr. 14:22-17:7.) This Court then explained to the petitioner the operation of the advisory Sentencing Guidelines and the petitioner indicated that he understood. (Plea Tr. 17:21-19:14.)

The petitioner acknowledged that the Plea Agreement had been translated for him before he signed it and that he fully understood it. (Plea Tr. 19:15-20:20.) He confirmed that the Plea Agreement contained "everything that [he] understood about [his] plea and [his] sentence." (Plea Tr. 20:8-10.) The petitioner stated that no promises or threats had been made to him to induce him to plead guilty, or to enter into the Plea Agreement. (Plea Tr. 20:17-20.)

This Court read to the petitioner the waiver provision in the Agreement. (Plea Tr. 20:21-25.) The Court asked, "Mr.

Faife, do you understand you have given up or waived your right to appeal or otherwise challenge or litigate in any proceeding, including any habeas corpus proceeding, any sentence within the range of 135 to 168 months or any sentence below that range[?]" (Plea Tr. 20:25-21:4.) The petitioner responded, "Yes." (Plea Tr. 21:5.) The petitioner admitted his guilt, and explained the factual basis for his plea. (Plea Tr. 23:17-25:9.) The petitioner stated that he was entering his plea voluntarily and this Court accepted his plea and found that it was knowing and voluntary. (Plea Tr. 27:18-19, 28:8-15.)

Following this guilty plea, the petitioner's counsel wrote a letter to the Court, dated October 9, 2007, and requested a sentence below the Sentencing Guidelines Range based on various considerations including personal factors. (Pet'r's Mot. Ex. C.)

The petitioner appeared for sentencing before this Court on February 29, 2008, with the presence of a Spanish interpreter, who translated the entire proceeding for him. (Sent. Tr. 1-2:11.) After addressing several questions from the petitioner, this Court accepted the findings of fact in the Pre-sentence Report ("PSR"). (Sent. Tr. 23:18-19.) After considering the various sentencing factors set forth in 18 U.S.C. § 3553(a), the Court imposed a term of imprisonment of 120 months on Counts 1 and 2, to run concurrently, and a term of three years'

supervised release on both counts to run concurrently. (Sent. Tr. 23:18-24:7.) The judgment setting forth the terms of the sentence was signed on March 3, 2008.

Notwithstanding the waiver of appeal contained in the Plea Agreement, the petitioner filed a pro se notice of appeal on March 14, 2008. The petitioner's counsel on appeal filed an Anders brief requesting to be relieved as counsel on the grounds that, first, the petitioner had waived his right to appeal, and second, there were no non-frivolous issues to be raised on appeal. (See Anders Br. 14-21.) The Government also filed a motion to dismiss the petitioner's appeal, or in the alternative, for summary affirmance. The Second Circuit Court of Appeals granted summary affirmance on February 23, 2009. See United States v. Faife, No. 08 Cr. 1333 (2d Cir. Mar. 17, 2009).

The petitioner then filed this motion on January 19, 2010, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, in which he raises the claim of ineffective assistance of counsel at sentencing.

II

The Government argues at the outset that the waiver of appeal or collateral attack contained in the Plea Agreement prohibits this Court from reaching the merits of a challenge to the petitioner's sentence.

The Court of Appeals for the Second Circuit has explained that

> [i]n no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless.

United States v. Salcido-Contreras, 990 F.2d 51, 53 (2d Cir. 1993) (per curiam); see also United States v. Djelevic, 161 F.3d 104, 106-07 (2d Cir. 1998) (per curiam) (internal citation omitted); Czernicki v. United States, 270 F. Supp. 2d 391, 393 (S.D.N.Y. 2003); Henriquez v. United States, No. 03 Civ. 478, 2003 WL 21242722, at *1 (S.D.N.Y. May 29, 2003). The waiver, however, does not prevent a defendant from "seek[ing] relief from the underlying plea where the plea was not knowing and voluntary." United States v. Haynes, 412 F.3d 37, 39 (2d Cir. 2005) (per curiam); see also Almonte v. United States, Nos. 06 Cr. 460, 08 Civ. 1192, 2008 WL 2755818, at *2 (S.D.N.Y. July 14, 2008). Moreover, the waiver would not bar a claim of ineffective assistance of counsel directed at agreeing to the plea agreement itself. "To raise a claim despite a guilty plea or appeal waiver, the petitioner must show that the plea agreement was not knowing and voluntary . . . because the advice he received from counsel was not within acceptable standards."

Parisi v. United States, 529 F.3d 134, 138 (2d Cir. 2008) (internal citations and quotation marks omitted); see also Giraldo-Perez v. United States, No. 08 Civ. 7529, 2009 WL 1492222, at *2-3 (S.D.N.Y. May 28, 2009).

In addition, the Court of Appeals for the Second Circuit has determined that waivers of appeal or collateral attack similar to the waiver in this case apply against claims that arise after the execution of the plea agreement. See Garcia-Santos v. United States, 273 F.3d 506, 509 (2d Cir. 2001) (per curiam) (holding that a waiver of appeal or collateral challenge barred claims of error at sentencing when petitioner sought to raise them on § 2255 challenge to sentence); see also Djelevic, 161 F.3d at 107 (rejecting petitioner's argument that his waiver should not bar consideration of his appeal because counsel was ineffective at the time of sentencing rather than at the time of the plea).

In this case, the petitioner does not assert that he received ineffective assistance of counsel at the time he entered into the Plea Agreement. The petitioner also does not argue that the waiver of the right to appeal or collateral attack was not knowing and voluntary. Instead, the petitioner claims that the waiver is inapplicable because it did not specifically waive ineffective assistance of counsel claims arising from conduct that took place after execution of the Plea

Agreement. This argument is similar to those that the Court of Appeals for the Second Circuit rejected in Garcia-Santos and Djelevic. See Garcia-Santos, 273 F.3d at 509; Djelevic, 161 F.3d at 107.

The plain language of the Plea Agreement in this case provides that the petitioner waived the right to collateral attack under § 2255 which would include a challenge based on alleged ineffective assistance of counsel at sentencing. In the Plea Agreement, the petitioner agreed not to appeal or litigate under § 2255, "any sentence within or below the Stipulated Guidelines Range of 135 to 168 months." (Plea Agr. 4.) The Court of Appeals for the Second Circuit, in reading a plea agreement containing essentially the same waiver of appeal language, determined that, "[t]here is no suggestion in the language of the agreement that the defendant is waiving only claims that have already arisen." Garcia-Santos, 273 F.3d at 509; see also Djelevic, 161 F.3d at 107. The Court of Appeals also acknowledged that if the Court "were to allow a claim of ineffective assistance of counsel at sentencing as a means of circumventing plain language in a waiver agreement, the waiver of appeal provision would be rendered meaningless." Djelevic, 161 F.3d at 107. Thus, the petitioner's claim of ineffective assistance of counsel at sentencing is barred by the waiver contained in the Plea Agreement and is therefore denied.

III

Even if the Court were to reach the merits of the petitioner's claim, the petitioner has not demonstrated that his counsel provided ineffective assistance at the time of sentencing.

The petitioner contends that his sentence should have been lower in light of the disparity between his sentence and the sentences of his allegedly similarly situated co-defendants. The petitioner asserts that his counsel provided ineffective assistance at the time of sentencing by failing to present evidence regarding the length of his co-defendants' sentences.

To establish a claim of ineffective assistance of counsel, the petitioner must show both that: (1) his counsel's performance was deficient in that it was objectively unreasonable under professional standards prevailing at the time, and (2) his counsel's deficient performance was prejudicial to his case. See Strickland v. Washington, 466 U.S. 668, 687 (1984); see also Garcia-Giraldo v. United States, 691 F. Supp. 2d 500, 510 (S.D.N.Y. 2010).

To meet the first prong of the Strickland test, the petitioner must establish that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Strickland, 466 U.S.

at 687. There is a "strong presumption" that defense counsel's conduct fell within the broad spectrum of reasonable professional assistance, and a petitioner "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (citing Strickland, 466 U.S. at 688-89); see also Garcia-Giraldo, 691 F. Supp. 2d at 510.

To meet the second prong of the Strickland test, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see also Garcia-Giraldo, 691 F. Supp. 2d at 510.

With respect to the first prong of the Strickland test, the petitioner has not demonstrated that his counsel's performance at the time of sentencing was objectively unreasonable. As explained above, the Plea Agreement contained a Sentencing Guidelines Range of 135 to 168 months. The petitioner was fully advised by counsel at the time the Plea Agreement was executed and the petitioner agreed that this Sentencing Range was reasonable in light of all the factors set forth in 18 U.S.C. § 3553(a). Prior to sentencing, petitioner's counsel wrote to

this Court and requested a sentence below the Sentencing Guidelines Range based on a variety of factors. This Court considered those factors and sentenced the petitioner principally to a term of incarceration of 120 months, a sentence below the Sentencing Guidelines Range. Counsel's ability to achieve a sentence below the Sentencing Guidelines Range, which the petitioner agreed was reasonable, belies the petitioner's assertion that counsel's performance was objectively unreasonable. Counsel made a reasonable judgment as to which factors should be stressed and obtained a downward variance despite the parties' agreement that a higher sentence would have been reasonable. Thus, the petitioner has not overcome the strong presumption that his counsel's conduct was reasonable at the time of sentencing.

Moreover, there is no showing of prejudice. There is no showing of a reasonable probability that a consideration of sentences for co-defendants would have led to a further reduction in the defendant's wholly reasonable sentence. Thus, the petitioner suffered no prejudice from his counsel's omission.

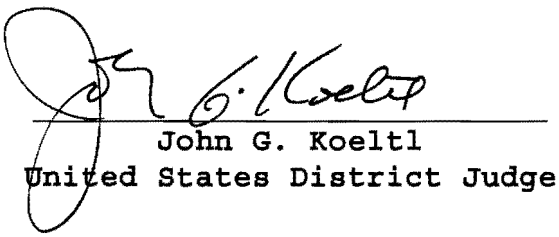
CONCLUSION

For the reasons explained above, the petitioner's motion pursuant to 28 U.S.C. § 2255 is **denied**. The Clerk is directed

to enter judgment dismissing the petition and closing this case. The Court declines to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2) because the petitioner has failed to make a substantial showing of the denial of a constitutional right.

SO ORDERED.

Dated: New York, New York
September 21, 2010



John G. Koeltl
United States District Judge